Abdul Rahman bin Hj Yaacob (representing the estate of the deceased Hj Yaacob bin Awang) v Mohd Salleh bin Hj Yusoff

HIGH COURT (KOTA BHARU) — CIVIL SUIT NO 3 OF 1969
SURIYADI J
15 MARCH 2001

Civil Procedure *— Judgment — Consent judgment — Application for leave to execute terms of consent order — Plaintiff failed to comply with terms of consent order within the time stipulated — No 'liberty to apply' clause — Whether court should allow plaintiff's application*

The plaintiff filed a writ of summons against the defendant claiming that the transfer and register made of a particular plot of land be declared null and void, and that the register be rectified accordingly. By consent before the court, both parties had earlier agreed that the plaintiff pay the defendant RM3,350, inclusive of costs, within one month from the date of judgment, and upon receipt of that sum, the defendant was to execute a valid and registrable transfer of the said land to the plaintiff. In default of that payment, the right of the latter was to be forfeited. The plaintiff was alleged to have failed to pay the agreed sum to the defendant within the stipulated time. The plaintiff's version of the story, however, was that he had prayed that the court grant him leave to execute the conditional consent order. The plaintiff's son (as the plaintiff had already passed away) claimed that the plaintiff's failure to comply with the consent order was because the defendant had adamantly refused to accept the sum of RM3,350 within the agreed period. The plaintiff's counsel had produced several witnesses to convince the court of this. The defendant's counsel in his counter-argument had maintained that in the event the defendant had refused to accept the money, surely the plaintiff could have paid the money to his solicitor instead. The issue to be resolved here is whether after having failed to comply with the terms of the consent order within the stipulated period, the plaintiff could still apply to court and enforce those terms.

Held, allowing the application with costs:

(1) The court was satisfied that there was a consent order recorded by the court. In this case, even though nothing was inserted or agreed upon that, in the event of non-compliance with any of the terms, enforcement could still be made possible vide an application to the court, the very nature of the plaintiff's complaints made it unnecessary. This was so as his inability to comply with the terms rested solely on the obstructive and uncooperative act of the defendant, in not permitting the former to fulfil his part of the deal. At the end of the hearing, the court had accepted the plaintiff's version (see p 640E–G).

(2) The absence of a 'liberty to apply' clause in the consent order here, should not prevent the plaintiff from filing this application. The court is of the opinion that the situation in this case warranted the court to exercise its discretionary power to allow the plaintiff's application; *Poisson and Woods v Robertson and Turvey* (1901–1902) 50 WR 260 followed. There was nothing available before the court to show that the witnesses were not credible, had been coached or their evidence had been tainted by some reason or other (see p 641A–C).

[**Bahasa Malaysia summary**

Plaintif telah memfailkan satu saman writ terhadap defendan menuntut bahawa pemindahan dan pendaftaran yang dibuat ke atas satu plot tanah tertentu diisytiharkan batal dan tak sah, dan bahawa daftar tersebut dibetulkan sewajarnya. Dengan kebenaran mahkamah, kedua-dua pihak telah sebelum ini bersetuju bahawa plaintif membayar kepada defendan RM3,350, termasuklah kos, dalam tempoh sebulan daripada tarikh penghakiman, dan dengan penerimaan jumlah tersebut, defendan sepatutnya telah melaksanakan satu pemindahan tanah yang sah dan boleh didaftarkan kepada plaintif. Dengan kegagalan untuk membayar, hak beliau akan dirampas. Plaintif dikatakan telah gagal untuk membayar jumlah yang dipersetujui kepada defendan di dalam tempoh yang ditetapkan. Versi cerita plaintif, bagaimanapun, adalah bahawa beliau telah memohon agar mahkamah memberikan beliau kebenaran untuk melaksanakan perintah kebenaran bersyarat tersebut. Anak lelaki plaintif (memandangkan plaintif telahpun meninggal dunia) menuntut bahawa kegagalan plaintif untuk mematuhi perintah kebenaran tersebut adalah kerana defendan telah menolak dengan keras untuk menerima jumlah RM3,350 di dalam tempoh yang dipersetujui. Peguam plaintif telah mengemukakan beberapa orang saksi untuk meyakinkan mahkamah ini. Peguam defendan di dalam hujahan balas beliau telah mengekalkan bahawa di dalam keadaan defendan telah menolak untuk menerima wang tersebut, pastinya plaintif sepatutnya boleh membayar wang tersebut kepada peguamcara beliau sebaliknya. Persoalan yang perlu diputuskan di sini adalah sama ada setelah gagal untuk mematuhi terma-terma perintah kebenaran tersebut di dalam tempoh yang ditetapkan, plaintif masih boleh memohon kepada mahkamah dan menguatkuasakan terma-terma tersebut.

Diputuskan, membenarkan permohonan tersebut dengan kos:

(1) Mahkamah telah berpuas hati bahawa terdapat satu perintah kebenaran yang direkodkan oleh mahkamah. Di dalam kes ini, walaupun tiada apa-apa yang dimasukkan atau dipersetujui bahawa, di dalam keadaan ketidakpatuhan dengan apa-apa terma, penguatkuasaan masih boleh dibuat melalui satu permohonan

kepada mahkamah, di mana sifat aduan plaintif membuatkan ia tidak perlu. Ini adalah demikian kerana beliau tidak mampu untuk mematuhi terma-terma yang semata-mata berdasarkan atas tindakan defendan yang suka menghalang dan tidak bekerjasama, yang tidak membenarkan yang pertama itu untuk memenuhi sebahagian daripada urus janji tersebut. Pada akhir perbicaraan tersebut, mahkamah telah menerima versi plaintif (lihat ms 640E–G).]

(2) Ketiadaan 'kebebasan untuk menggunakan' klausa di dalam perintah kebenaran di sini, tidak sepatutnya menghalang plaintif daripada memfailkan permohonan ini. Mahkamah berpendapat bahawa keadaan di dalam kes ini mewarankan mahkamah menggunakan kuasa budi bicaranya untuk membenarkan permohonan plaintif; *Poisson and Woods v Robertson and Turvey* (1901–1902) 50 WR 260 diikut. Tiada apa-apa yang dikemukakan ke mahkamah yang menunjukkan bahawa saksi-saksi tersebut tidak boleh dipercayai, telah dilatih atau keterangan mereka telah dicemari oleh sebab lain (lihat ms 641A–C).]

Notes

For cases on consent judgment, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2497–2502.

Cases referred to

EF Phillips & Sons Ltd v Clarke [1969] 3 All ER 710 (refd)
Green v Rozen [1955] 1 WLR 741 (refd)
Poisson and Woods v Robertson and Turvey (1901–1902) 50 WR 260 (folld)
Tong Lee Hwa v Chin Ah Kwi [1971] 2 MLJ 75 (refd)

Zainal Abidin bin Mustaffa (*Zainal & Mariani*) for the plaintiff.
Foo Say Ghee (*Foo Say Ghee & Zamzuri*) for the defendant.

Suriyadi J. : The plaintiff had filed a writ of summons on 26 January 1969 against the defendant claiming, inter alia, that the transfer made and registered on 29 March 1964 by the plaintiff to the defendant of Lot 2550, Padang Embong, Pasir Mas be declared null and void, and that the register be rectified accordingly. In substitution, the plaintiff was to be registered as the proprietor of the said land. By consent before Abdul Razak J on 6 January 1976, both parties agreed that the plaintiff do pay the defendant RM3,350, inclusive of costs, within one month from the date of judgment, and upon receipt of that sum, the defendant was to execute a valid and registrable transfer of land Lot No 2250 to the plaintiff. In default of that payment, the right of the latter was to be forfeited. The plaintiff was alleged to have indeed failed to exercise the right above, as he was alleged to have failed to pay the RM3,350 to the defendant, within the stipulated time. The plaintiff on the other hand had another version to the whole story, ie pertaining to the non-payment. Pursuant to encl 49, the plaintiff had prayed

that the court grant him leave to execute the above conditional consent order. I heard that application on 1 August 2000.

During the hearing, the plaintiff's son (as the plaintiff had already passed away) had claimed that the reason for the plaintiff's failure to comply with the consent order, was because the defendant had adamantly refused to accept the sum of RM3,350 within the agreed period. The plaintiff's counsel had produced several witnesses to convince the court that the plaintiff had actually made three attempts to pay the said amount to the defendant, but to no avail. The defendant's counsel in his counter argument had steadfastly maintained that his client at that material time was represented, and in the event the defendant had refused to accept the money, surely the plaintiff could have paid the money to his solicitor instead.

The all important issue that had to be resolved in the process, was, whether after having failed to comply with the terms of the above consent order within the stipulated period, the plaintiff could still apply to court, and enforce those terms. Before arriving at any conclusion, it was imperative for me to lay down certain ground rules pertaining to the problem at hand. I had to start off with the issue of a consent order, ie whether it did exist. Such an order exists, after being recorded by the court, but only if parties have managed to reach a settlement before or during a trial. As regards this issue, in *Green v Rozen* [1955] 1 WLR 741, the court had refused the application by the plaintiff in the original action to enforce the terms of the settlement, as agreed by both parties, as the terms were only set out on the backs of counsel's brief, followed by their signatures. The court concluded that as there was no order pronounced by it, it thus had no jurisdiction in respect of that cause of action. In this case, I was satisfied that there was a consent order recorded by the court.

In this case, even though nothing was inserted or agreed upon that, in the event of non-compliance of any of the terms, enforcement could still be made possible vide an application to the court, the very nature of the plaintiff's complaints made it unnecessary. This was so, as his inability to comply with the terms, rested solely on the obstructive and uncooperative act of the defendant, in not permitting the former to fulfil his part of the deal. At the end of the hearing I had accepted the plaintiff's version.

The next issue to be resolved was whether there was any 'liberty to apply' term in the consent agreement of 6 January 1976 (see *EF Phillips & Sons Ltd v Clarke* [1969] 3 All ER 710 regarding this phrase). Factually, I found none. In the absence of the above terms, could I then exercise my jurisdiction to allow the plaintiff's application, and at the same time extend the period of time fixed for the plaintiff to complete the terms of the consent order? In *Tong Lee Hwa v Chin Ah Kwi* [1971] 2 MLJ 75, at holding 6, the Federal Court had intimated that the words 'liberty to apply' in an order, prima facie, meant that when the order was drawn up, its working out might involve matters that might require a decision of the court; they do not confer any right to ask the court to vary the order. Parties will be at liberty to go back to court for the purpose of working out the terms of the settlement. In

A our present case however, the issue involved was more complicated in nature whereby, the plaintiff had come back to court to obtain leave of the court to execute the terms of the consent order due to the uncooperative stance of the defendant. The plaintiff was not asking the court to work out the terms of the order, nor asking the court to vary the order. The absence of a 'liberty to apply' clause in the consent order here therefore, should not prevent the plaintiff from filing this application in the first place. In the case of *Poisson and Woods v Robertson and Turvey* (1901–1902) 50 WR 260, at p 261 the court had occasion to state:

> in any event, the equities of the first defendant's application as contrasted with the stand taken particularly by the second defendant require that where the delay in the completion was occasioned by the default of the second defendant for his own end, the time fixed for completion must be extended if necessary, by the exercise of the court's discretion.

Following the case above, I was of the opinion that the situation in the case before me warranted the court to exercise its discretionary power. How could I not have been convinced of the plaintiff's case when PW2, the wife of the late plaintiff in clear terms testified that she personally went to the defendant's house with her late husband, to make the alleged payment but was rebuffed. The defendant instead told her husband to make the necessary payment at his office. Likewise the same thing happened there. She took a 'beca' (a form of public transport) to reach the house, ridden by one Zaili bin Berahim. The latter (PW4), confirmed all the salient facts, even to the extent of knowing the purpose of the visit to the defendant's house. He also saw the money brought by the plaintiff. PW3 also testified that she loaned RM1,000 to the late plaintiff for purposes of the impugned payment. If I may add, there was nothing available before me to show that the witnesses were not credible, had been coached or their evidence had been tainted by some reason or other.

Having heard the evidence, and having assessed the credibility and demeanor of all the witnesses, on a balance of probability, I had decided in the plaintiff's favour, and had allowed the application with costs.

Application allowed with costs.

Reported by Wong Ee Lynn